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Supreme Court of the United States

OCTOBER TERM — 1958.

No. 388.

PROGRESSIVE BUILDERS, INC.,

Petitioner,

—against—

DISTRICT OF COLUMBIA,

Respondent.

REPLY BRIEF FOR PETITIONER

I

Statements in Respondent's Brief are Contrary to the Record.

Respondent would have this Court believe that the petitioner's claims are unjustified and that the equity in the case is with the respondent and not with the petitioner. So it is said in respondent's brief (page 5) that "it is, however, undisputed in the record that the contract work was not actually completed until March 4, 1952, which was 306 days after the expiration of the completion date as extended".

The respondent however omits the finding of the Trial Court that for the period from August 23, 1951 to March 4, 1952 the delays were primarily due to unreasonable requirements imposed by respondent, and that for this period of time,

or a total of 195 days, petitioner would be entitled to recover the retained liquidated damages, except for the failure to meet contract requirements relative to extensions of time (App. 28a).

With respect to petitioner's claim for damages in having been required to perform work beyond the requirements of the contract, respondent refers to petitioner's claim as though the merits of the claim had been decided against the petitioner and an attempt is made to show that petitioner's contentions are "without substance" (p. 8), whereas in fact the Trial Court found that petitioner had sustained damages in the amount of $45,649.57, but was barred from recovery because of failure to take an administrative appeal (App. 30a-31a). Respondent has misparaphrased the decision of the Trial Court to read "that petitioner had not established a right to the relief which it sought" (p. 8). We submit that a bar to a recovery because of technical failure to meet contract provisions with respect to administrative appeals is far different from the right to recover.

A further example of the wrong impression sought to be created is the statement that, "Under the circumstances, as pointed out by the court below (R. 94), liquidated damages were properly charged against petitioner" (page 7). In the first place, the reference to "R. 94", is incorrect and meaningless. There is no page 94 in the Joint Appendix which is the record submitted in the case. If respondent refers to the opinion of the United States Court of Appeals, which on this petition is the "court below", that Court merely held that the liquidated damages provision "is valid" (Appendix A, p. 13 of petition for certiorari), and made no ruling as to whether the liquidated damages were properly charged. If respondent refers to the opinion of the Trial Court, that court held that liquidated damages to the extent of 195 days, or $19,500, were improperly charged, but recovery therefor was barred (App. 28a).

Furthermore, respondent completely misstates the record on the notice given by petitioner as to the causes of delay as it appears in the agreed statement of the case (App. 37a). It

is stated in respondent's brief that "Here, as the record discloses, petitioner made no effort in the direction of compliance with the "Delays-Damages" provisions of Article 9 by giving notice *oral or written*, of the causes of delay" (p. 6). (Italics ours.) The record, however, is that within three days of ascertaining the dangerous condition due to petitioner's attempt to perform tests which were impossible of accomplishment under the contract design, petitioner wrote to the contracting officer advising him as to such condition and requesting a meeting to discuss the method of conducting the tests (App. 49a-50a), that such meeting was had on October 2, 1951, at which the conditions were discussed (App. 50-51a) and, as found by the Trial Court (App. 28a), the contracting officer imposed unreasonable requirements with respect to such tests; and on October 9, 1951, within 7 days from the meeting, petitioner wrote the contracting officer as follows (App. 51a):

> "We have been delayed several months in an effort to overcome these latent conditions which were beyond our control.
>
> "It is our intention to install wellpoints in order to lower ground water so that tests can be performed, but give you due notice that this work will be performed only under protest and that we will make claim for the extra expense and delays caused by the latent conditions."

II

Respondent Has Failed to Answer Contentions of Petitioner Urged in Support of the Petition.

Respondent's brief fails to answer or make any reference to the following contentions of petitioner urged in support of the petition:

1. In *United States* v. *Blair*, 321 U. S. 730 (1944), the questions of whether a claim for damages for breach of con-

tract was "under" or "dehors" the contract, and (b) whether administrative agencies have statutory authority to entertain claims for breach of contract, were not presented, argued or determined.

2. Subsequent to the *Blair* decision, and notwithstanding the same, administrative appeal boards have continued to hold that they have no authority to pass upon unliquidated claims for breach of contract and other courts have likewise held to the same effect.

3. Administrative appeal would have been futile here, and therefore, unnecessary, even under the *Blair* decision, for the reason that the Commissioners of the District of Columbia had no jurisdiction to entertain claims in excess of $10,000.00.

4. Administrative appeal would have been futile here, in any event, as shown by the recovery allowed on the third cause of action for extra work, where administrative appeal was taken by petitioner but no action was had thereon for more than two years before the commencement of this action.

5. Notice within ten days of direction to perform work beyond contract requirements is adequate notice of delay.

6. The requirement for notice of causes of delay within ten days from the commencement of delay does not require a request for extension of time within the same period.

7. Liquidated damages may not be imposed where applicable to several portions of the work without contract provision for such apportionment where some of the severable items are finished on time.

8. Where extra work is ordered requiring performance beyond the completion date, the contractor is entitled to an extension of time of the entire contract pending completion of the extra work.

III

The Questions Presented are of General, Nation-Wide Importance.

Respondent attempts to minimize the public importance of the questions here presented, and refers to them as "of purely local significance in the enforcement of a District of Columbia contract for the construction of public works" (p. 7). Even if this case involved only District of Columbia contracts, there would be sufficient reason for the granting of the petition by this court.

But it is conceded by respondent that "involved at the trial was a District Government contract *on a standard form*" (p. 4) (Italics ours).

That standard form is the form of all United States construction contracts and the construction and application of the provisions thereof affect not only the District of Columbia, but public works on all Federal contracts. The decision of this court on the questions presented will therefore have nation-wide application.

The existing confusion, as to the limits of administrative authority and the rights of contractors under the standard form of contract, evidenced by the decision of the Trial Court and Court of Appeals here applying the decision of this Court in *United States* v. *Blair* to bar recovery, in conflict with decisions of other Courts holding administrative appeals on claims for breach of contract unauthorized, and consistent refusals of administrative agencies to entertain claims for breach of contract, because of absence of statutory authority, notwithstanding the *Blair* decision, should be terminated by this Court and the situation clarified.

CONCLUSION

The Petition for the Writ of Certiorari Should be Granted.

Respectfully submitted.

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Certificate of Service

I, EMANUEL HARRIS, counsel for petitioner on the petition for a writ of certiorari herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 22nd day of October, 1958, I served copies of the foregoing Reply Brief for Petitioner on the District of Columbia, Respondent, by causing copies thereof to be mailed in a duly addressed envelope, with postage prepaid, to Chester H. Gray, Corporation Counsel, District of Columbia, the attorney for the Respondent.

Dated: October 22nd, 1958.

EMANUEL HARRIS,
Counsel for Petitioner.